

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.A., by and through her parents and guardians,
J.A. and W.A.,

Plaintiff,

v.

BLUE CROSS AND BLUE SHIELD OF
ILLINOIS, a division of HEALTH CARE
SERVICE CORPORATION ILLINOIS STATE
PAC, NFP; THE BOEING COMPANY
MASTER WELFARE PLAN; THE BOEING
SERVICE CENTER FOR HEALTH AND
INSURANCE PLANS; and EMPLOYEE
BENEFIT PLANS COMMITTEE,

Defendants.

Case No. 2:13-CV-00357-RSM

ORDER ON MOTIONS FOR SUMMARY
JUDGMENT

This matter comes before the Court on Motions for Summary Judgment by both Plaintiff and Defendants. Dkt. ## 33, 50. Plaintiff claims that she is entitled to sixteen hours per day of in-home skilled nursing care in lieu of hospitalization under a Boeing Health Care Plan governed by the Employee Retirement Security Act of 1974 (“ERISA”), 29 U.S.C. § 1101 *et seq.* Defendants move the Court to dismiss Plaintiff’s complaint in its entirety or, alternatively, to limit an award of coverage to October 25, 2013, when Plaintiff’s conditions and treatment needs were to be reevaluated. Oral argument was not requested by the parties, and the Court finds it unnecessary. Having reviewed the administrative record, the parties’ motions, and the remainder of the record,

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2 the Court grants Plaintiff's Motion and denies Defendant's Motion except as to the dismissal of
3 Plaintiff's claim under ERISA § 502(a)(3).

4 5 **Introduction**

6 This ERISA lawsuit arises out of the decision of Defendants Blue Cross and Blue Shield
7 of Illinois ("BCBSIL") to deny Plaintiff's claim for in-home skilled nursing care benefits.
8 Plaintiff, A. A., was born in 1997 with cerebral palsy, developmental delays, a seizure disorder,
9 chronic restrictive lung disease, blindness, and other complex medical conditions related to a
10 stroke suffered *in utero*. *See, e.g.*, Administration Record ("AR"), p. 171. Plaintiff requires
11 continuous seizure monitoring and assistance with activities of daily living, as well as periodic
12 suctioning to maintain her airway, administration of scheduled and unscheduled "rescue"
13 anticonvulsant medications and nebulizer treatment, and mechanical administration of oxygen to
14 help with her ability to breathe. She is intolerant to oral feeding and receives her nutrition via
15 gastrostomy and jejunostomy tubes. *See, e.g.*, AR at pp. 146, 171, 186, 313; Dkt. # 15-1, Ex. A-
16 C. Plaintiff's parents received training in substitute home nursing care and were previously able
17 to provide for A.A.'s care without continuous assistance. However, A.A.'s medical needs have
18 grown more complex with age, and in fall of 2011, A.A.'s parents formally sought coverage for
19 in-home nursing care. *See* AR at p. 426.

20 **A. Health Care Plan and Relevant Provisions**

21 At issue in this case is the interpretation of the health care plan under which A.A. is
22 covered. A.A. is a beneficiary through the Boeing Company Employee Health Care Plan
23 ("Plan") as a result of her father's employment. *See* Dkt. # 12-1, Ex. A; Dkt. # 13, ¶ 4. The Plan
24 incorporates the Summary Plan Description ("SPD") (AR at p. 1, *et seq.*) and the Boeing
25 Company Master Welfare Document (AR at p. 48, *et seq.*). AR at p. 2. Though the parties
26 dispute whether authority was properly delegated by the Plan Administrator, all agree that

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2 Defendant BCBSIL acts as the Plan's third-party claims administrator and has conducted review
3 and coverage determinations over A.A.'s claims.

4 Central to this case are two Plan provisions: 1) the "home health care" services provision
5 and 2) the exclusion of custodial and maintenance services. The Plan explicitly provides for
6 "home health care" services for members but only "when inpatient hospital or skilled nursing
7 facility care otherwise would be required" and when the member is "homebound." By the Plan's
8 definition, "homebound" means "that leaving home involves a considerable, taxing effort and
9 that you cannot use public transportation without help." AR at p. 15. Covered home health care
10 services include: "respiratory therapy services," "intermittent skilled nursing services," "home
11 health aide services," and "medical supplies" that would otherwise be provided on an inpatient
12 basis. *Id.* The Plan excludes from home health care service coverage "custodial care," or care
13 "that does not require continuing services by skilled medical or health professionals and
14 primarily assist in the activities of daily life." *Id.* at p. 25. It also excludes "maintenance care," or
15 "care provided by licensed professionals or other medical staff that is not expected to result in
16 significant improvement in the patient's medical condition once the patient's condition has
17 stabilized and plateaued." *Id.* at p. 43.

18 **B. Application, Review, and Denial of Plaintiff's Benefits Claim**

19 On September 29, 2011, A.A.'s mother made the first claim under the Plan for in-home
20 skilled nursing services for Plaintiff. This claim resulted in a lawsuit, *A.A. v. Blue Cross blue*
21 *Shield of IL, et al.*, No. 2:12-cv-00363-TSZ, which was dismissed after the parties reached a
22 confidential settlement agreement. Dkt. # 24-1, Ex. HH. As a result, BCBSIL covered A.A.'s in-
23 home nursing care under the Plan at a rate of 16 hours per day until November 30, 2012. Dkt. #
24 12-1, Ex. L, p. 100. The Plan requires the claimant's attending physician to periodically review
25 the home health care treatment plan and certify that claimant's condition continues to meet the
26 Plan's benefits criteria. AR at p. 15. In fall of 2012, Defendants began their first review of A.A.'s
continued needs for in-home nursing care, including review of Letters of Medical Necessity

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2 (LOMNs) from A.A.'s care providers attesting to the necessity of requested services as well as
3 notes from A.A.'s in-home nurses. *See* AR at pp. 138-161. After an initial denial, appeal, and
4 several extensions of coverage, BCBSIL ultimately denied coverage of A.A.'s request on
5 February 14, 2013. Dkt. # 12-1, Ex. K-M, S. BCBSIL stated as grounds for denial that (1) the
6 care was custodial and/or maintenance and thereby excluded under the Plan, (2) the necessary
7 services do not require continuous oversight from a licensed nurse, and can be provided by a
8 trained caregiver (including A.A.'s parents) or scheduled nurse visits as needed, (3) A.A. is not
9 homebound, and (4) in-patient hospitalization or skilled nursing facility care would not otherwise
10 be required. *Id.* at Ex. K.

11 On expedited appeal, the initial denial was referred for independent medical review to Dr.
12 Jacob Hen, Jr.. Based on his review of the available clinical information and records, Dr. Hen
13 concluded that A.A. did not qualify for home health care because 1) she would not otherwise
14 require transfer to an inpatient hospital or skilled nursing facility, and 2) she was not
15 "homebound" as she attended school. Dkt. # 12-1, Ex. DD. On February 21, 2013, BCBSIL
16 denied Plaintiff's appeal on slightly altered grounds, including (1) the Plan limits home health
17 care to 120 visits each benefit year, (2) to not provide 16 hours of skilled nursing care would not
18 necessitate transfer to inpatient hospital or skilled nursing facility, (3) A.A. is not homebound as
19 she attends school, and (4) clinical assessment is the only clinical service A.A. requires that must
20 be performed by a covered professional. Dkt. # 12-1, Ex. B. After Plaintiff initiated the present
21 litigation, BCBSIL added two additional grounds for claim denial: (1) skilled care for the
22 purpose of evaluating pulmonary function is needed but only on an intermittent basis, and (2)
23 A.A.'s other conditions are custodial and/or maintenance in nature. Dkt. # 12-1, Ex. C. BCBSIL
24 also concluded that nursing records demonstrate that A.A. has greater respiratory stability than
25 indicated in the LOMNs from her care providers. *Id.*

26 **C. Procedural History**

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2 Plaintiff filed the instant complaint on February 26, 2013, claiming benefits, enforcement
3 of rights and terms of her medical care Plan, and attorney's fees and costs under ERISA § 502.
4 Dkt. # 1. On May 24, 2013, this Court granted Plaintiff's Motion for Preliminary Injunction,
5 finding that Plaintiff had established that she would likely succeed on the merits of her ERISA
6 claim for benefits. Dkt. # 32. The Court ordered Defendants to continue providing skilled in-
7 home nursing care to A.A. at a rate of 16 hours per day, seven days per week until further order
8 of the Court. *Id.* This matter now returns to the Court upon motions for summary judgment by
9 both parties for resolution of Plaintiff's entitlement to in-home skilled nursing care under the
10 Plan.

11 **Standard of Review**

12 Under ERISA § 502(a), a participant or beneficiary may sue in federal court "to recover
13 benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan,
14 or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B);
15 *see also Aetna health Inc. v. Davila*, 542 U.S. 200, 210 (2004). The Court reviews benefit denial
16 under ERISA de novo "unless the benefit plan gives the administrator or fiduciary discretionary
17 authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire*
18 *& Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). The Court consequently begins with the
19 wording of the plan in determining the applicable standard of review. *See Abatie v. Alta Health*
20 *& Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006). "[F]or a plan to alter the standard of review
21 from the default of de novo to the more lenient abuse of discretion, the plan must unambiguously
22 provide discretion to the administrator." *Id.* (citing *Kearney v. Standard Ins. Co.*, 175 F.3d 1084,
23 1090 (9th Cir. 1999)(en banc)); *see also Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 110-
24 11 (2008). As both parties assume, for the purpose of summary judgment motions, that the abuse
25 of discretion standard applies, the Court proceeds under this standard.¹

26 ¹ Although A.A. contends that Defendants are not entitled to the "abuse of discretion" standard due to the alleged failure of the Boeing Employee Benefits Committee to delegate discretionary authority to claims administrator BCBSIL, the Court does not reach this dispute. Plaintiff assumes, for the purpose of her motion for summary

A. Application of Abuse of Discretion Standard

When a decision to grant or deny ERISA benefits is reviewed for an abuse of discretion, “a motion for summary judgment is merely the conduit to bring the legal question before the district court and the usual tests of summary judgment...do not apply.” *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999), *rev’d on other grounds*, *Abatie v. 458 F.3d at 965* (9th Cir. 2006). Under the abuse of discretion standard, the plan administrator’s interpretation of the plan “will not be disturbed if reasonable.” *Conkright v. Frommert*, 559 U.S. 506, 521 (quoting *Firestone*, 489 U.S. at 115).

In determining how to apply the abuse of discretion standard, the court considers whether plan administration involved a structural conflict of interest. A structural conflict of interest exists where “the same entity that funds an ERISA benefits plan also evaluates claims,” creating a situation where “benefits are paid out of the administrator’s own pocket, so by denying benefits, the administrator retains money for itself.” *Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 630 (9th Cir. 2009). Where a conflict exists, the abuse of discretion standard still applies, but the “conflict must be weighted as a factor in determining whether there was an abuse of discretion.” *Abatie*, 458 F.3d at 965. The review of the Court will then be “tempered by skepticism” to a degree depending on the severity of the conflict. *Harlick v. Blue Shield of Cal.*, 686 F.3d 699, 707 (9th Cir. 2012). Where no conflict of interest exists, a plan administrator abuses its discretion if it “(1) renders a decision without explanation, (2) construes provisions of the plan in a way that conflicts with the plain language of the plan, or (3) relies on clearly erroneous findings of fact.” *Boyd v. Bell*, 410 F.3d 1173, 1178 (9th Cir. 2005); *see also Montour*, 588 F.3d at 629-30. “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Boyd*, 410 F.3d at 1178 (internal citations and quotations omitted).

judgment, that the “abuse of discretion” standard applies. *See* Dkt. # 33, p. 8.

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2 In the instant matter, Plaintiff contends in opposition to Defendant's motion that late-
3 disclosed emails by Defendants suggest that an actual and structural conflict of interest exists in
4 this case. Specifically, Plaintiff contends that there is sufficient evidence to show that the Boeing
5 Company, the entity that funds A.A.'s coverage, was also involved in the decision to deny her
6 coverage. *See* Dkt. # 55, p. 17. Plaintiff requests additional discovery into the scope of
7 Defendants' possible conflicts of interest only in the event that the Court denies Plaintiff's
8 motion under the more deferential application of the abuse of discretion standard. The Court
9 therefore first considers Plaintiff's claims under the deferential abuse of discretion standard as
10 articulated in *Boyd*. *See Munsen v. Wellmark, Inc.*, 257 F.Supp.2d 1172, 1187 (N.D. Iowa
11 2003)("The court finds that it need not consider application of this 'less deferential' standard of
12 review until it determines whether or not [plaintiffs'] claim fails under the more typical
13 'deferential' standard of review."). In doing so, the Court confines its review to the
14 administrative record and only considers evidence that was before the Plan Administrator when
15 it determined to decline A.A.'s claim. *Winz-Byone v. Metro Life. Ins. Co.*, 357 Fed.Appx. 949,
16 951 (9th Cir. 2009).

17 Analysis

18 There is no dispute as to Defendants providing a sufficient explanation in rendering their
19 decision to deny A.A.'s claim. Accordingly, the Court considers whether BCBSIL construed the
20 Home Health Care provision of A.A.'s Plan in a way that conflicts with the plain language of the
21 Plan or relied on clearly erroneous findings of fact in reaching its decision. At issue are several
22 findings made by the Plan administrator: (1) that A.A.'s in-home care is not in lieu of inpatient
23 hospitalization or institutionalization; (2) that A.A. is not "homebound"; (3) that A.A.'s care is
24 "custodial," and (4) that A.A.'s care is "maintenance."

25 A. In lieu of hospitalization or institutionalization

26 The Home Health Care provision of A.A.'s Plan covers home health care visits, including
skilled nursing services, "only when inpatient hospital or skilled nursing facility care otherwise

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2 would be required.” AR at p. 15. There is no dispute that the Court owes deference to
3 Defendant’s construction of the provision “to afford private nursing services only to persons
4 who...would otherwise require an inpatient hospital stay for ongoing care.”² Dkt. # 34 at p. 16;
5 Dkt. # 35, pp. 9-10. At issue, however, is whether Defendants relied on erroneous findings of
6 fact in reaching their conclusion that Plaintiff would not require hospitalization if in-home
7 nursing care were withdrawn. The Court finds that Defendants did so err, leading them to
8 arbitrary and capriciously conclude that A.A.’s needs did not qualify under the home health care
9 provision.

10 The Administrative Record in this case clearly demonstrates that Plaintiff would require
11 hospitalization without skilled in-home nursing care. In reaching its conclusion, BCBSIL relied
12 primarily on the findings of its Medical Director, Dr. Vomvouras, and independent reviewer, Dr.
13 Hen. *See* Dkt. # 34 at p. 18. On February 13, 2013, Dr. Vomvouras noted that A.A.’s last ER
14 visit occurred in May, 2012 and that since 2011, she had two inpatient ER admissions and three
15 outpatient ER visits. AR at pp. 140-41. Dr. Vomvouras then misconstrued this evidence to
16 support a finding that A.A. would not otherwise require hospitalization. Directly contradicting
17 Dr. Vomvouras’ conclusion, A.A.’s pattern of hospitalizations evidences the necessity of nursing
18 care: both hospitalizations occurred prior to coverage of skilled nursing care, and A.A.’s reliance
19 on inpatient hospitalization declined in concert with her receipt of home health care benefits. Dr.
20 Hen’s perfunctory conclusion that A.A. would not otherwise be hospitalized is also premised on
21 critical errors. In his review, which included extensive notes about A.A.’s medical conditions
22 and care needs, Dr. Hen failed to make any notation about Plaintiff’s need for suctioning or other
23 respiratory aid. He omitted “suctioning” from a table of services that A.A. requires and noted,

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25 ² Defendants contend that Plaintiff would have the Court impose an alternative construction whereby the Plan covers
26 in-home care to avoid *the risk* of future hospitalization. Dkt. # 34, p. 16. In doing so, Defendants misconstrue
Plaintiff’s argument. Rather than suggesting an alternative construction, Plaintiff directs her argument toward the
clearly erroneous nature of the findings of fact on which Defendant relied in reaching its conclusion that
hospitalization would not otherwise be required. *See* Dkt. # 35, pp. 9-10.

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2 when prompted about her possible need for suctioning, that “[t]here are no additional Clinical
3 services provided to the patient not reflected in the table above.” AR at p. 323-24. In light of the
4 errors and contradictions within Dr. Vomvouras’ and Dr. Hen’s own reports, the Court has little
5 trouble concluding that Defendants relied on erroneous findings of fact.

6 At the same time, the Administrative Record in this case is replete with evidence that
7 A.A. would require hospitalization if nursing services are withdrawn. A.A.’s treating providers
8 uniformly attest to this effect. *See, e.g.*, Declaration of Dr. Thida Ong, AR at p. 440 (“[A.A.’s]
9 condition is not stable without skilled nursing care...If nursing care were removed, [A.A.] may
10 suffer respiratory distress leading to further, more expensive hospitalization, or, in the worst
11 case, further disability or death.”). A.A.’s treating physician Dr. Walker reported to BCBSIL that
12 A.A. required seven extended hospitalizations between 2009 and 2011 prior to in-home nursing
13 support, a record indicating that “without appropriate nursing support at home, recurrent
14 hospitalizations can and should be expected for [A.A.]” AR at p. 648.³ Notes from Plaintiff’s
15 nurses also indicate that medical and mechanical interventions were required, periodically and
16 sporadically, during the day and night. *See Id.* at ¶ 5; AR at pp. 498-534; AR at pp. 191-227
17 (indicating periodic seizure activity and respiratory distress during day and night, requiring
18 trained medical response). The Court does not identify indicia of unreliability that would
19 undermine the many similar findings of A.A.’s physicians, as Defendants suggest. *C.f. Holifield*
20 *v. Unum Life. Ins. Co. of Am.*, 640 F.Supp.2d 1224, 1242 (C.D. Cal. 2009)(*quoting Batson v.*
21 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1995 (9th Cir. 2004)). To the contrary, their
22 LOMNs contain detailed, objective descriptions of the patient’s medical history and current care
23 needs, which are consistent with A.A.’s nursing reports.

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26 ³ As discussed in Part D *infra*, Defendants misconstrue a second-hand statement by Dr. Walker that AA “is stable
and not at risk for a catastrophic event.” Dkt. # 47, p. 20; AR at p. 147. Aside from the hearsay nature of this
evidence, it is clear that Dr. Walker’s opinion to this effect was predicated on the assumption that A.A. continue to
receive 16 hours of continuous in-home skilled nursing care. *See* AR at p. 145.

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2 Defendants' conclusion that inpatient hospitalization would not otherwise be required is
3 patently unreasonable in light of Plaintiff's pattern of both around-the-clock and spontaneous
4 needs for skilled medical care and her history of hospitalization prior to in-home care. Judge
5 Lasnik rejected an insurer's similar attempt to rely on the lapse in time since hospitalization in
6 *K.F. ex. rel. Fry v. Regence Blueshield*, 2008 WL 5330901, *2 (W.D. Wash. 2008). As in the
7 instant case, "[t]he only reason [plaintiff] has stayed out of the hospital...is because her parents
8 have stepped forward to provide or obtain medical services for her when [the insurer] declined to
9 do so. [The insurer's] analysis would force parents to stand by and watch as their child's health
10 deteriorates to the point where acute medical intervention becomes necessary just so they could
11 prove that her condition is serious enough to require hospitalization." *Id.* The Court similarly
12 finds that BCBSIL abused their discretion in concluding that A.A.'s condition is not serious
13 enough to require inpatient care in lieu of in-home nursing. *See Id.* at *2 n. 2 ("Even under an
14 abuse of discretion standard, the Court would conclude that [the insurer's] coverage
15 determination was unreasonable.").

16 The Court also disagrees with Defendants' argument that even if A.A. is eligible for in-
17 home skilled nursing care, "there is no evidence in the record suggesting that 16 hours of
18 continuous care is medically necessary." Dkt. # 34, p. 18. As an initial matter, the Court notes
19 that there is no dispute that 16 hours of in-home skilled nursing care is an authorized benefit
20 under the Plan and one that has been previously accorded to Plaintiff. As to the necessity of
21 continuous rather than intermittent care, Defendants concede that A.A.'s respiratory needs can
22 occur on a scheduled or unscheduled basis. *See* Dkt. # 35, p. 10; AR at pp. 141-142 (discussing
23 scheduled medical care supplemented by "nebulizers, chest PT twice daily [] with additional as
24 needed nebulizers, CPT and cough assist as needed" and remarking that "additional suctioning or
25 nebulizer use [was] documented"). A.A.'s treating physicians are in complete agreement that she
26 requires at least 16 hours of continuous skilled nursing care, a regime which has previously
proven effective in reducing her need for inpatient hospitalization. *See, e.g.*, AR at pp. 439-441,

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2 146, 166, 171 (“Our medical team is recommending 16 hrs per day of skilled hourly nursing care
3 for Anna at home. Her medical condition is totally dependent on the skill and vigilance of her
4 caregivers in order to prevent recurrent hospitalization.”); Dkt. # 14-1, Ex. B, p. 1; Dkt. # 12-1,
5 Ex. G; Dkt. # 24; Ex. NN. BCBSIL’s attempt to restrict A.A.’s care to an intermittent basis is
6 clearly unreasonable in light of her simultaneously continuous and unpredictable medical needs.
7 *See K.F.*, 2008 WL 4330901, at *5 (determining that “twenty-four hours of skilled nursing care
8 is necessary” in light of plaintiff’s round-the-clock mechanical and medical needs); *Fritcher v.*
9 *Health Care Service Corp.*, 301 F.3d 811, 818 (7th Cir. 2002)(determining that insurer’s decision
10 to limit skilled nursing coverage to a 2-hour scheduled visit was “patently unreasonable.”). Even
11 under the most highly deferential standard, the Court finds that BCBSIL clearly abused its
12 discretion in determining that hospitalization would not result upon the withdrawal of A.A.’s
13 current regime of sixteen hour skilled nursing care.

14 **B. Homebound**

15 Defendants contend that Plaintiff does not qualify for home health care services because
16 she is not “homebound” as required under the Plan. Defendants base this conclusion on the fact
17 that “A.A. attends school full-time with the assistance of an aide, who has allegedly been trained
18 to perform suctioning and other interventions, but is not herself a nurse.” Dkt. # 34, p. 12.
19 Plaintiff assert that Defendants’ interpretation of the “homebound” provision is inconsistent with
20 the plain language of the Plan. Dkt. # 35, p. 9. The Court agrees.

21 The Plan restricts the provision of home health care services to members who are
22 “homebound.” AR at p. 15. The Plan defines “homebound” to mean “that leaving home involves
23 a considerable, taxing effort and that you cannot use public transportation without help.” *Id.* The
24 plain language of the plan conditions “homebound” on two criteria: 1) whether leaving the home
25 involves “considerable” and “taxing” effort, and 2) whether the member requires assistance to
26 use public transportation. Defendants fail to offer any evidence to demonstrate that A.A. does not
meet these criteria, relying instead entirely on the fact of her school attendance.

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2 Defendants' interpretation of "homebound" is clearly inconsistent with the Plan
3 language. By Defendants interpretation, any member who is capable of being present outside of
4 the home (i.e. at school) would not be considered homebound. In other words, Defendants
5 improperly focus on the fact of the member's presence outside of the home and not the manner
6 in which she left the home (i.e. with considerable, taxing effort and with necessary help in using
7 public transport), which is what the Plan explicitly deems relevant to its definition of
8 "homebound." Defendants' interpretation is patently unreasonable, as it would lead to the absurd
9 result that no one could be considered homebound as there is no one who could not be, in some
10 manner, removed from the home. As one court pointed out with respect to an insurance
11 company's similar interpretation of a "homebound provision," such an interpretation "does not
12 even include dead people, who although patently unable to leave the home via their own efforts,
13 can leave home with the assistance of equipment and other people." *Munsen v. Wellmark, Inc.*,
14 257 F.Supp. 1172, 1191-92 (N.D. Iowa 2003). Defendants cannot rely on an interpretation that is
15 both illogical and would render meaningless the clear and explicit criteria that the Plan employs.

16 There is ample evidence in the Administrative Record that A.A. meets the Plan's
17 definition of "homebound." Plaintiff's treating physicians all attest, and Dr. Hen confirmed upon
18 medical review, that Plaintiff is both bed-bound and wheelchair-bound. *See, e.g.*, Dkt. # 12-1,
19 Ex. DD; AR at pp. 4, 10 ("[A.A.] has no ability to reposition herself and is at significant risk for
20 decubitis."). A.A.'s attendance at school is conditioned on assistance with transport by a skilled
21 aide, who provides suctioning and nursing interventions during transport and at school under the
22 direct supervision of a nurse. AR at p. 653. In light of substantial and uncontradicted evidence
23 demonstrating that Plaintiff cannot leave her home or ride public transport without considerable,
24 taxing effort and assistance, Defendants abused their discretion in determining that she does not
25 meet the Plan's definition of "homebound."

26 C. Custodial Care

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2 Defendants claim that even if Plaintiff meets her initial burden of establishing an
3 affirmative entitlement to home health care, such care is still excluded because it is “custodial” in
4 nature. Defendants argue primarily that: 1) suctioning is not a skilled nursing task under
5 Washington law, and 2) suctioning is not the primary task performed by A.A.’s caregivers. *See*
6 Dkt. # 34, pp. 20-21. The Court again agrees with Plaintiff that Defendants have abused their
7 discretion in relying on an interpretation of the Plan at odds with its plain language.

8 A.A.’s Plan states that it does not cover “custodial” care under its home health care
9 provision. AR at p. 25. It defines “custodial” as that care which is “designed primarily to assist in
10 the activities of daily living and is not primarily provided for its therapeutic value in treating an
11 illness or injury.” AR at p. 42. It expressly excludes care “that does not require continuing
12 services by skilled medical or health professionals.” AR at p. 25. The Plan provides a non-
13 exhaustive list of care that qualifies as custodial, including assistance in “walking, getting into
14 and out of bed, toileting, bathing, dressing, feeding, preparing special diets, and supervising
15 medications that ordinarily are self-administered.” *Id.*

16 First, it is clear that A.A.’s care requires services of skilled medical or health
17 professionals. Defendants contend that there is no requirement under Washington law that
18 suctioning be performed only by a skilled nurse. Yet Washington law bars the delegation of
19 specified skilled nursing services, including administration of medications and acts that require
20 nursing judgment. RCW 18.79.260(3); WAC 246-840-910. It is undisputed that Plaintiff requires
21 the daily administration of an intricate regime of planned and as-needed medications. *See, e.g.,*
22 AR 187-88 (Nursing Plan of Care laying out routine and as-needed medications, including for
23 spontaneous seizure activity and respiratory distress). Plaintiff seeks continuous in-home nursing
24 care precisely because her complex medical needs, such as for planned and unplanned suctioning
25 and as-needed administration of rescue medication, necessitate acts that require nursing
26 judgment. Moreover, Washington has clearly indicated its intent to classify suctioning as a
skilled nursing service by explicitly doing so in the Medicaid context. *See* WAC 182-551-

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2 3000(1)(d)(classifying “suctioning” as a skilled nursing service that cannot be met within the
3 scope of intermittent home health services and which qualifies clients seventeen years of age and
4 younger for continuous in-home nursing care).

5 More generally, Defendants’ interpretation of “custodial” care is unreasonable in its over-
6 breadth, as it would turn skilled care with an assisted living component into care that is custodial
7 in nature. Defendants contend that because Plaintiff only receives *intermittent* suctioning
8 accompanied by other forms of assistance, her 16-hour per day nursing care regime must be
9 primarily intended to assist in the activities of daily living. Their definition again elides the plain
10 language of the Plan, which excludes care that is “*designed primarily* to assist” in daily living
11 activities. AR at p. 25 (emphasis added). The Plan explicitly embraces skilled care with an
12 unskilled component as non-custodial.

13 Here, Plaintiff’s care is designed primarily to meet her complex medical needs that
14 cannot be provided by an unskilled provider, including for suctioning and medical interventions
15 such as rescue therapy when unpredictable seizure activity ensues. *See, e.g.*, Dkt. # 15, Ex. A, p.
16 2 (“[A.A.] requires suctioning..., medication administration and medical assessment to determine
17 when to use ‘rescue’ therapy. These interventions are medically necessary, needed by [A.A.]
18 and...are clearly medical interventions.”); Dkt. # 12-1, Ex. G (“[A.A.]’s specialized needs are
19 out of the scope of practice of an unskilled personal care provider.”). A.A.’s Nursing Plan of
20 Care with New Care Concepts is clearly designed to address necessary medical interventions,
21 such as suctioning and administration of as-needed medication for seizures, respiratory distress,
22 and other spontaneously arising agitation. *See* AR at pp. 186-190. The fact that nurses perform
23 unskilled tasks “in and around their more technical skilled duties” does not transform their
24 skilled care into custodial care. *Watts v. Organogenesis, Inc.*, 30 F.Supp. 2d 101, 109 (D. Mass.
25 1998).

26 **D. Maintenance Care**

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2 Like “custodial care,” Plaintiff’s Plan also excludes “maintenance care” from coverage.
3 AR at p. 25. The Plan defines “maintenance care” as “[c]are provided by licensed professionals
4 or other medical staff that is not expected to result in significant improvement in the patient’s
5 medical condition once the patient’s condition has stabilized and plateaued.” AR at p. 43.
6 Defendants argue that BCBSIL properly excluded Plaintiff’s care as “maintenance” because her
7 condition is “stable.” Dkt. # 34, p. 23. The Court disagrees.

8 First, the Court finds that Defendants rely on erroneous findings of fact in determining
9 that Plaintiff’s health condition has stabilized. Defendants rely largely on a post-litigation denial
10 letter as evidence that A.A.’s nursing notes “do not document any repeated episodes of
11 respiratory failure.” AR at p. 855; Dkt. # 12-1, Ex. C. However, this conclusory finding is
12 contradicted by the nursing notes themselves, which, as discussed *supra*, evidence unplanned
13 rescue interventions by A.A.’s nurses to avert respiratory failure and control seizure activity.
14 Where a patient consistently requires planned and unplanned medical intervention to survive, her
15 health condition is clearly unstable.

16 Defendants also misconstrue statements by A.A.’s treatment providers to classify her
17 health condition as stable. Again, Defendants rely on a statement by BCBSIL Medical Director
18 Dr. Vomvouras about her phone call with Dr. Walker, in which he reportedly “concluded that the
19 member is stable and not at risk for a catastrophic event... .” AR at p. 147. Yet Dr. Walker’s
20 conclusion to this effect was clearly predicated on the assumption that A.A. continue to receive
21 16 hours of continuous skilled nursing care. *See* AR at p. 146 (statement by Dr. Walker in
22 support of Plaintiff’s request to continue in home nursing care at 16 hours per day). He and
23 A.A.’s other treatment providers have uniformly affirmed that A.A.’s condition would greatly
24 decline without nursing services.

25 The Court further finds that Defendants used statements by Plaintiff’s treatment providers
26 in service of an interpretation of the “maintenance” care provision that is at odds with the Plan
language. Defendants rely on indications of the patient’s relative stability achieved through in-

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2 home nursing care to classify her care as “maintenance.” In doing so, they commit the same
3 fallacy as when previously arguing that A.A. does not qualify for home health care because she
4 is not presently hospitalized.⁴ With respect to both provisions, the patient is only stable and
5 therefore avoiding hospitalization because she has been receiving 16 hours of in-home nursing
6 care. If this care were withdrawn, her stability would diminish, necessitating medical
7 intervention. It is only because of the benefits of nursing care that A.A. has been able to maintain
8 sufficient stability to avoid hospitalization, which is precisely what the Plan contemplates.

9 **E. Availability of Injunctive Relief**

10 It is undisputed that the Court is invested with the authority to determine A.A.’s
11 eligibility for future medical benefits under the Plan. 29 U.S.C. § 1132(a)(1)(B); *Pilot Life Ins.*
12 *Co. v. Dedeaux*, 481 U.S. 41, 53 (1987)(explaining that relief under §502(a) may include “a
13 declaratory judgment on entitlement to benefits [] or an injunction against a plan administrator’s
14 improper refusal to pay benefits”). Nonetheless, Defendants contend that injunctive relief is
15 inappropriate for two reasons: (1) remand is the proper course where an administrator
16 misconstrues a plan’s terms, and (2) permanent injunction would be contrary to the right to
17 periodic evaluation provided by the Plan. The Court finds both arguments by Defendants
18 unavailing and orders sixteen hours of in-home nursing care reinstated for Plaintiff until BCBSIL
19 properly reaches the unlikely determination that A.A.’s medical condition no longer necessitates
20 this benefit.

21 In the ordinary instance where an insurer denies a member’s claim because of a failure to
22 properly apply plan provisions, the appropriate remedy is for the Court to remand the case to the
23 administrator to re-determine in light of the corrected interpretation. *See, e.g., Pannebecker v.*
24 *Liberty Life Ins. Co. of Boston*, 542 F.3d 1213, 1221 (9th Cir. 2008); *Saffle v. Sierra Pac. Power*
25 *Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 460-61 (9th Cir.

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⁴ *See* Dkt. # 32, p. 4 (determining that an interpretation by Defendants that rests on the fact that she does not
presently need hospitalization is likely unreasonable).

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2 1996)(ordering remand where an ERISA administrator “misconstrued the Plan and applied a
3 wrong standard to a benefits determination”). This matter, however, is not such an ordinary case.
4 In instances such as the present, where an ERISA administrator has granted and then wrongfully
5 terminated a benefit “as a result of arbitrary and capricious conduct, the claimant should continue
6 receiving benefits until the administrator properly applies the plan’s provisions.” *Pannebecker*,
7 542 F.3d at 1221 (citing *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th
8 Cir. 2001)). *See also Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623 (9th Cir.
9 2009)(remanding to the district court to order reinstatement of long-term disability benefits
10 because claimant would have continued receiving them absent the ERISA administrator’s
11 arbitrary and capricious conduct); *Taylor v. Reliance Standard Life Ins. Co.*, 2012 WL 113558,
12 *3 (rejecting, under *Pannebecker*, insurer’s request for remand).

13 Defendants mistakenly rely on *Conkright v. Frommert*, 559 U.S. 506 (2010), for the
14 proposition that the Court must limit relief to remand. In *Conkright*, the Court rejected a “‘one-
15 strike-and-you’re-out’ approach” to ERISA actions taken by a district court that declined to
16 accord deference to a plan administrator’s decision based on the administrator’s prior “single
17 honest mistake in plan interpretation.” *Conkright*, 559 U.S. at 509. An administrator had
18 interpreted the plan at issue to require a contested approach, referred to as the “phantom account
19 method,” for calculating distributions of retirement payments for covered employees. On judicial
20 review, the district court applied a deferential standard of review and upheld the administrator’s
21 interpretation. The Second Circuit subsequently vacated and remanded the decision, holding in
22 part that the administrator’s interpretation was unreasonable. Upon remand, the administrator
23 offered a new approach, which the district court rejected, finding that it did not owe deference to
24 the administrator’s interpretation. It was this decision not to extend deference that was the
25 subject of the Supreme Court’s holding.

26 Defendants fail in their attempt to shoehorn the instant case into *Conkright*’s holding.
First, *Conkright* did not consider an instance in which an administrator had previously

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2 determined to extend benefits to a claimant and then had arbitrarily and capriciously withdrawn
3 them. Nor did *Conkright* consider a situation analogous to the present in which the Plan
4 Administrator relied on multiple erroneous findings of fact in addition to misconstruing Plan
5 provisions. And most critically, *Conkright*'s holding was expressly limited to instances in which
6 an administrator commits a "single honest mistake" in plan interpretation. The *Conkright* Court,
7 in fact, distinguished cases such as the present where an ERISA administrator manifests a
8 consistent pattern of egregious denials, "thereby undermining the prompt resolution of benefits"
9 and producing needless litigation. 599 U.S. at 521. The Court explained that "[m]ultiple
10 erroneous interpretations of the same plan provision even if issued in good faith, might well
11 support a finding that the plan administrator is too incompetent to exercise his discretion fairly."
12 *Id.* In the instant case, Defendants' pattern of repeated denials in reliance on successive
13 erroneous interpretations of the Plan and erroneous findings of fact and resulting in two lawsuits
14 manifests just such a pattern. *See Lafferty v. Providence Health Plan*, 720 F.Supp.2d 1239, 1241
15 (D. Or. 2010).

16 Finally, the Court disagrees with Defendants that it is precluded from issuing any relief
17 for the period after October 25, 2013. Dkt. # 59, p. 2. Neither party disputes that, under the
18 terms of the Plan, BCBSIL is entitled to reevaluate A.A.'s medical condition in the future and
19 make eligibility determinations on the basis of then-existing facts. *See* AR at p. 15. At the same
20 time, the Court is clearly empowered under ERISA § 502(a) to clarify future medical benefits
21 under the Plan. Accordingly, the Court clarifies that Defendants are to continue providing
22 Plaintiff with sixteen hours of in-home nursing care per day.⁵ Defendants may only withdraw
23 such benefits in the future if the Plan Administrator determines that A.A.'s medical condition no
24 longer necessitates these benefits. When reevaluating A.A.'s benefits in the future, BCBSIL must
25 make any determination in a manner that is entirely consistent with this Order. In so doing,

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⁵ As this Order with its attendant clarifications is issued after October 25, 2013, a reevaluation of A.A.'s condition at that point, if indeed such reevaluation did occur, does not affect the Court's instant award of benefits.

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2 BCBSIL must refrain from relying on erroneous interpretations of Plan provisions and findings
3 of fact as specified herein. In ordering this relief, the Court does not herein abrogate the
4 Administrator's ability to exercise its discretion in making future determinations under the Plan
5 or declare "an immutable right to coverage." *K.F.*, 2008 WL 5330901, at *5 n. 5. It simply
6 affirms that absent the unlikely future determination that A.A. no longer qualifies for such
7 benefits, BCBSIL may not terminate her current regime of 16 hours per day of in-home skilled
8 nursing care.

9 **F. ERISA Section 502(a)(3) Claim**

10 Defendants move the Court to dismiss Plaintiff's claim for payment of benefits under
11 ERISA § 502(a)(3). Described as a "catchall" provision, Section 502(a)(3) offers "appropriate
12 equitable relief for injuries caused by violations that Section 502 does not elsewhere adequately
13 remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1995). Dismissal of a Section 502(a)(3)
14 claim is appropriate at the summary judgment stage where a plaintiff has asserted, and obtained
15 relief for, a claim under Section 502(a)(1)(B). *See Ford v. MCI Comms. Corp. Health & Welfare*
16 *Plan*, 399 F.3d 1076, 1083 (9th Cir. 2005), *rev'd on other grounds*, *Cyr v. Reliance Standard*
17 *Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011). Plaintiff agrees to the dismissal of her Section
18 502(a)(3) claim should the Court grant her Motion for Summary Judgment. The Court
19 consequently finds that dismissal of Plaintiff's Section 502(a)(3) claim is appropriate at this
20 stage.

21 **G. FRCP 56(d) Discovery**

22 Plaintiff requests in opposition to Defendants' Motion for Summary Judgment that the
23 Court permit discovery under Federal Rule of Civil Procedure 56(d) into possible conflicts of
24 interest among Defendants should the Court deny Plaintiff's Motion. Dkt. # 55. As the Court
25 hereby grants Plaintiff's Motion for Summary Judgment, Plaintiff's request for discovery is
26 accordingly denied.

Conclusion

For the reasons stated herein, the Court hereby ORDERS that Plaintiff's Motion for Summary Judgment (Dkt. # 33) is GRANTED and Defendants' Motion for Summary Judgment (Dkt. # 50) is GRANTED in part and DENIED in part. Defendants' Motion is granted as to the dismissal of Plaintiff's claim under ERISA § 502(a)(3). Defendants' Motion is denied in all other respects.

Defendants shall continue providing Plaintiff with sixteen hours of in-home skilled nursing care. In the future, Defendants may only withdraw such care upon a finding by the Plan Administrator, reached in a manner consistent with this Order, that Plaintiff's medical condition no longer necessitates these covered benefits.

Dated this 7th day of March 2014.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE